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EX PARTE

Electronic Filing via ECFS

January 18, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Implementation of the Telecommunications Act of 1996 –
Telecommunications Carriers' Use of Customer Proprietary Network
Information and Other Customer Information, WC Docket No. 96-115*

*In the Matter of Petition for Rulemaking to Enhance Security and
Authentication Standards for Access to Customer Proprietary Network
Information, RM-11277*

Dear Ms. Dortch:

Qwest hereby submits the attached *ex parte* for inclusion on the record in the above-referenced proceedings.

This submission is made pursuant to Sections 1.49(f) and 1.1206(b) of the rules of the Federal Communications Commission, 47 C.F.R. §§ 1.49(f), 1.1206(b).

Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachment

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January 18, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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Dear Ms. Dortch:

On January 11, 2007 Qwest representatives met with various Federal Communications Commission ("Commission") Legal Advisors¹ to discuss the impending *CPNI Order*. Part of that discussion involved the possible imposition by the Commission of an "opt-in" customer approval requirement with respect to a carrier's use and release of Customer Proprietary Network Information ("CPNI") in the context of independent contractors and joint-venture partners.² With this filing, Qwest wishes to clarify its position that the Commission be guided by

¹ See *ex parte* filing dated January 11, 2006 from Melissa E. Newman, Vice President-Federal Regulatory to Marlene H. Dortch, Secretary, Federal Communications Commission (identifying Qwest attendees as Dave Heller, Craig Brown, Lynn Starr and Melissa Newman and FCC attendees in separate meetings as John Hunter, Scott Bergmann, Scott Deutchman, and Ian Dillner).

² As the Commission is aware, the use of any customer opt-in approval requirement as a predicate to a carrier's use of CPNI for truthful and lawful communications is replete with First Amendment considerations. This matter has been addressed in Verizon's December 22, 2006 *ex parte* filed in the above-captioned proceedings, which Qwest supports. This *ex parte* does not address this fundamental issue.

47 U.S.C. Section 217 of the Communications Act³ when crafting rules regarding use, access and release of CPNI with respect to carriers and those businesses acting on their behalf, including agents and independent contractors.

Section 217 makes clear that carriers are responsible for agents “or other person[s] acting for” a carrier.⁴ The Commission has correctly held that the “language [of Section 217] is extremely broad and clearly extends to [independent contractors] ‘acting for’” [a carrier].⁵ Indeed, the Commission has observed that a contrary holding would go against Congressional expectations: “To hold that [Section 217] does not include independent contractors would create a gaping loophole in the requirements of the Act and frustrate legislative intent.”⁶ (It should be noted, as well, that “[i]dential language in another federal statute has been construed to impose criminal liability upon an employer for the acts of its independent contractors.”⁷)

A long line of Commission precedent makes clear that while carriers oftentimes act through employee “agents,”⁸ they also frequently act through third parties, including some that might be considered “independent contractors.”⁹ The decision of whether to act through an

³ 47 U.S.C. § 217.

⁴ *Id.*

⁵ See *In the Matter of Long Distance Direct, Inc. Apparent Liability for Forfeiture*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3300-01 ¶ 9 (2000) (“LDDI Apparent Liability Order”).

⁶ *Id.*

⁷ *Id.* There the Commission cited with approval a federal court’s construction of a statute with language identical to Section 217: the fact that a party is called an “independent contractor” “rather than an employee is of no significance . . . because the section uses the disjunctive ‘acting for or employed by.’” See *United States of America v. Corbin Farm Service*, 444 F. Supp. 510, 525 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978).

⁸ See *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, 19118-19 ¶¶ 74-75 and n.93 (2001) (carriers are responsible for representations of employees or other agents).

⁹ See, e.g., *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14880-81 ¶¶ 45-46 and n.121 (2002) (“Many carriers employ independent contractors such as telemarketers rather than their own employees.”) (“CPNI Third Report and Order”). And see *In the Matter of Toll Free Service Access Codes; Database Services Management, Inc. Petition for Declaratory Ruling; Beehive Telephone Company Petition for Declaratory Ruling*, Fifth Report and Order in CC Docket No. 95-155, Order in NSD File No. L-

employee or a contracted vendor is one of cost/benefit and economics. Changing this long-standing and routine commercial practice would impose undue burdens on carriers¹⁰ with no corresponding consumer benefit.¹¹ This is particularly true given that the record is bereft of evidence of contractor abuse of CPNI, particularly in the context of pretexting, or consumer harm stemming from the use of contractors. Regardless of whether a carrier does business through an agent or an independent contractor acting for it, a carrier cannot avoid the obligations associated with statutorily-imposed duties, *i.e.*, non-delegable obligations.¹²

Absent demonstrated proof of unchecked carrier abuse or significant consumer harm, a carrier should not be burdened by the substantial barrier inherent in an “opt-in CPNI approval” regime in the context of securing and using the services of an independent contractor when that

99-87, Order in NSD File No. L-99-88, 15 FCC Rcd 11939, 11953-54 ¶ 39 (2000) (“Common carriers are required to file tariffs under the Communications Act; nevertheless, they may also act through other entities in providing services under the Act. . . . We find nothing inappropriate about the BOCs’ selection of an entity that is not a common carrier to perform certain tariff-related functions on their behalf.” [footnotes omitted, but n.84 cited to 47 U.S.C. § 217]).

¹⁰ *CPNI Third Report and Order*, 17 FCC Rcd at 14880-81 ¶ 45 (“carrier burdens could be significant for [communications-related services associated with independent contractors] under an opt-in scenario because opt-in could immediately impact the way carriers conduct business”).

¹¹ The Commission has correctly held that consumers are not harmed when carriers share CPNI with “independent contractors (such as telemarketers) . . . to market and provide communications-related services . . . because under those circumstances, consumers are protected by the same or equivalent safeguards as those that exist when carriers use CPNI themselves.” *CPNI Third Report and Order*, 17 FCC Rcd at 14880-81 ¶ 45.

¹² See *LDDI Apparent Liability Order*, 15 FCC Rcd at 3300-01 ¶ 9 (“The Commission has ruled on numerous occasions that carriers are responsible for the conduct of third parties acting on the carrier’s behalf, including third party marketers.”). And see *In the Matter of Vista Services Corporation Apparent Liability for Forfeiture*, Order of Forfeiture, 15 FCC Rcd 20646, 20649-50 ¶ 9 (an argument that a carrier is not responsible for acts of an independent contractor acting on its behalf “is contrary to long-established principles of common law holding statutory duties to be nondelegable.”) and n.24 (“Employers are routinely held liable for breach of statutory duties, even where the failings are those of an independent contractor”) and n.21 (listing cases where the Commission has held carriers responsible for acts of contractors) (2000). See also *In the Matter of Qwest Communications International, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 18202, 18213 ¶ 28 (“We note that each of Qwest’s responses to these complaints state that Qwest made the switch based upon purported authorizations received from various third-party marketers of Qwest services. . . . To the extent Qwest is seeking to absolve itself of fault in these complaints by laying blame on its third-party marketers, we emphasize that the Commission on many occasions has made clear that carriers are responsible for the acts of their marketing agents.”) and n.66 (1999).

contractor is “acting for” it in the marketing, sales or provisioning of the carrier’s communications-related services. Nothing has changed since 2002 when the Commission promulgated its rules that would warrant a reversal. Nor has there been any demonstration that targeted enforcement, in the event of CPNI abuse, would not be a more appropriate and less restrictive regulatory response than imposing a CPNI opt-in approval requirement on the entire telecommunications industry.¹³ Accordingly, as discussed above, the Commission should not modify its current rules governing when carriers may act through independent contractors in the sale of communications-related services and share CPNI with those contractors.¹⁴

Respectfully submitted,

/s/ Kathryn Marie Krause

¹³ See notes 5 and 12, *supra*, for references to targeted enforcement actions where carriers were punished for actions of their hired independent contractors.

¹⁴ See 47 C.F.R. §§ 64.2005, 64.2007.